Office-Supreme C
FILE
MAR 7
CHARLES ELMORE

No. 524

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife,
Petitioners,

— vs. —

R. W. CARNEY and DOROTHY CARNEY, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

LANE SUMMERS,
Counsel for Respondents,
Central Building, Seattle 4, Wash.

KAHIN, CARMODY & HORSWILL
BURTON C. WALDO,
Of Counsel,
Central Building, Seattle 4, Wash.

THE ARGUS PRESS, SEATTLE

No. 524

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife,
Petitioners,

— VS. —

R. W. CARNEY and DOROTHY CARNEY, his wife,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

LANE SUMMERS,
Counsel for Respondents,
Central Building, Seattle 4, Wash.

KAHIN, CARMODY & HORSWILL
BURTON C. WALDO,
Of Counsel,
Central Building, Seattle 4, Wash.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Statement	2
Argument	4
I. Petition Not in Conformity with Rules	4
II. Claim Too Late	5
A. When was claim raised?	5
B. What is proper state procedure?	5
C. No surprise and ample non-federal grounds	6
D. State court without jurisdiction	7
III. No Federal Question Passed Upon by State Court	8
Conclusion	9

TABLE OF CASES

Bowe v. Scott, 233 U.S. 658	5
Brooks v. Hurd, 144 Wash. 276, 247 Pac. 238	6
Capital City Dairy Co. v. Ohio, 183 U.S. 238	5
Central Union Co. v. Edwardsville, 269 U.S. 190	6
Chesapeake & Ohio R. Co. v. McDonald, 214 U.S. 191	6
C.I.O. v. McAdory, 325 U.S. 472	6
Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326	8
Forbes v. State Council, 216 U.S. 396	8
Grannis v. Ordean, 234 U.S. 385	8
Harding v. Illinois, 196 U.S. 78	5, 6
Herndon v. Georgia, 295 U.S. 441	5
John v. Paullin, 231 U.S. 583	6
Kelly v. Carroll, 136 Wash. Dec. 445, 219 P.(2d) 79, *certiorari* denied November 27, 1950, 19 Law Week 3149	7
Kosten v. Fleming, 17 Wn.(2d) 500, 136 P.(2d) 449	7
Lydon v. Carney, 220 P.(2d) 894, 224 P.(2d) 634	1

Page

Martin v. Dept. of Social Security, 12 Wn.(2d) 329, 121 P.(2d) 394 7
McCorquodale v. Texas, 211 U.S. 432 8
Oxley Stove Co. v. Butler County, 166 U.S. 648 5
Parker v. Illinois, 333 U.S. 571 6
Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 6
State v. Hazzard, 76 Wash. 586, 137 Pac. 143 6
State v. Houck, 32 Wn.(2d) 681, 203 P.(2d) 693 7
State ex rel. Milwaukee Term. R. Co. v. Superior Court, 5 Wash. 365, 104 Pac. 175 6

STATUTES

28 U.S.C., §1257(3) 1

CONSTITUTION

United States Constitution, XIV Amendment 4, 8

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN E. LYDON and MARTHA LYDON, his wife, *Petitioners*, vs. R. W. CARNEY and DOROTHY CARNEY, his wife, *Respondents*.		No. 524

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The first opinion of the Supreme Court of the State of Washington (R. 11-13) is as yet unreported in the Washington Reports, but is reported at 220 P.(2d) 894. The second opinion of the state court (R. 29) is also unreported as yet in the Washington Reports but is reported at 224 P.(2d) 634.

JURISDICTION

Although not disclosed by the Petition, the Petitioners apparently seek to invoke 28 U.S.C., Section 1257(3) to support the jurisdiction of this Court, seeking relief from a judgment of the Supreme Court of the State of Washington, the highest court of that state, entered on November 30, 1950 (R. 30).

The Federal questions, if any, were raised for the first time in this litigation in the highest state court

by Petitioners' Reply to Appellants' Memorandum Resisting Recall of the Remittitur (R. 34), which memorandum was filed in the highest state court on December 8, 1950, said date being eight days after the date of the judgment and mandate (R. 30) of said court, and six days after the court of first instance had entered its judgment thereon (Petition, p. 13).

The highest state court entered an order (R.35) denying Petition to Recall Remittitur without opinion.

QUESTIONS PRESENTED

Whether a Federal question upon which this Court can pass was raised:

1. When the claim to the highest state court that a Federal constitutional right had been invaded was made after that court had lost jurisdiction of the cause under its rules and decisions.

2. When no Federal question was passed upon in any state court.

STATUTES INVOLVED

The only statutes involved are the provisions of the Drugless Healing Act of the State of Washington, set forth in the Petition at pp. 17-21.

STATEMENT

This litigation concerns a malpractice action against a drugless healer (R. 1-9). The jury returned a verdict in favor of Respondents, and the trial court

granted Petitioners' motion for judgment notwithstanding the verdict and denied their motion for a new trial (R. 10-11).

The Supreme Court of the State of Washington reversed the judgment of the lower court and directed the entry of judgment on the verdict (R. 11-13).

Petitioners filed a Petition for Rehearing (R.13-26), Respondents filed an Answer to Petition for Rehearing (R. 38-43), and the highest state court denied the Petition without opinion (R. 27).

The State Supreme Court then recalled the Remittitur (R. 28) to pass upon the finding of the trial court on the motion for a new trial, as it was required to do by its rules (R. 36-37).

Petitioners submitted two memoranda (not in record) urging that the trial court's ruling on this question was incorrect. Respondents filed a memorandum (R. 43-47) on this question. The State Supreme Court affirmed the ruling of the trial court in denying Petitioners' motion for a new trial (R. 29) and entered its judgment (R. 30) on November 30, 1950.

On December 6, 1950, Petitioners filed a petition in the State Supreme Court entitled "Petition to Recall Remittitur Pending Steps for Appeal to U.S. Supreme Court" (R. 31-32), Respondents filed a memorandum in answer thereto (R. 47), and Petitioners filed a reply memorandum (R. 33-35), for the first time (R. 34-35) asking the State Supreme Court to pass upon a Federal question.

The State Supreme Court denied the Petition to Recall Remittitur without opinion (R. 35).

ARGUMENT

Respondents respectfully submit that the Petition should be denied because:

I. The Petition is not in conformity with the Rules of the Court.

II. The Federal claim was raised too late in the highest state court, which had lost jurisdiction of the cause.

III. No Federal question was passed upon by the state court.

I. Petition Not in Conformity with Rules

Respondents respectfully submit that the Petition herein is not in conformity with Rule 12(1) par. 1 and 3, and Rule 38(2), Revised Rules of the Supreme Court of the United States, and should therefore be denied.

In addition, Petitioners close their Petition (pp. 14-15) "reserving for special treatment the questions: (1) in what respect does the judgment of the lower court impinge upon rights of your petitioners guaranteed by the XIV Amendment of the U. S. Constitution, (2) is the question a substantial one or vital in its ultimate effects and repercussions as such violation?" When are we to get the "special treatment"? When will Petitioners decide to raise their Federal question in this Court?

Inasmuch as under the rules and practice of this Court these are crucial issues, concerning which Petitioners have the laboring oar, Respondents do not feel bound to propound the negative. Respondents do feel that the omissions by Petitioners are fatal to their Petition.

II. Claim Too Late

A. When was claim raised?

Was Petitioners' Federal claim raised with particularity prior to their Reply to Appellants' Memorandum Resisting Recall of the Remittitur (R. 33-35)? We think not.

Petitioners first allege (Petition, p. 5) that such a claim was made in their Petition to Recall Remittitur (R. 31-32), which was filed six days after the State Supreme Court's judgment, and more than three months after they filed their Petition for Rehearing (R. 13-26).

That such allegations would not be adequate is made plain in *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655; *Herndon v. Georgia*, 295 U.S. 441, 442-3; *Harding v. Illinois*, 196 U.S. 78, 88; *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248; *Bowe v. Scott*, 233 U.S. 658, 664-5.

Moreover, the relief for which Petitioners prayed in this instance (R. 32) was for a recall of the judgment from the trial court, so that the same might be held in the State Supreme Court.

In their reply memorandum (R. 33-35) Petitioners do raise a Federal question, and they enlarged the scope of their prayer (R. 34-35) in an attempt to get another hearing on this matter.

B. What is proper state procedure?

The proper method of raising the Federal questions is dependent upon the particular state practice, at least as long as the litigant thereby has a reasonable

opportunity to have such an issue heard and determined. *Parker v. Illinois*, 333 U.S. 571, 574-5; *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-3; *Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-5.

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585.

See also *C.I.O. v. McAdory*, 325 U.S. 472, 477; *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191; *Harding v. Illinois*, 196 U.S. 78.

In the State of Washington, the Supreme Court has stated that upon Petition for Rehearing the Court will not consider points there raised for the first time, unless they can be reasonably predicated on assignments of error theretofore made. *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, 54 Wash. 365, 377, 104 Pac. 175.

The State Court will not consider a constitutional question first raised in a Petition for Rehearing. *State v. Hazzard*, 76 Wash. 586, 137 Pac. 143.

C. No surprise and ample non-federal grounds

Petitioners cannot claim surprise in the opinion (R. 11-13) of the State Court. In their Petition (pp. 7-8) they rely on *Brooks v. Hurd*, 144 Wash. 276, 247 Pac. 238, by partially quoting the Court's

holding. The sentence immediately preceding the sentence upon which they rely is:

> "Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing."

The other cases cited by the State Court, *Martin v. Dept. of Social Security*, 12 Wn.(2d) 329, 121 P.(2d) 394; *State v. Houck*, 32 Wn.(2d) 681, 203 P.(2d) 693; and *Kelly v. Carroll*, 136 Wash. Dec. 445, 219 P.(2d) 79, *certiorari* denied November 27, 1950, 19 Law Week 3149, are all applicable and controlling in the case at bar. Petitioners knew, or should have known, of all of them. Petitioners have at no place shown of any cases overruled or any reason for surprise.

D. State court without jurisdiction

At the time a Federal question was raised, the State Court had lost jurisdiction. In *Kosten v. Fleming*, 17 Wn.(2d) 500, 504-513, 136 P.(2d) 449, the Court discussed various holdings, texts, and rules at length, and held that after the transmittal of the Remittitur or Mandate to the lower court, the State Supreme Court lost jurisdiction and could not recall the Remittitur except where it considers that the judgment transmitted, because of inadvertent error, mistake, fraud or lack of jurisdiction, was not in fact the judgment of the Supreme Court, or where the lower court entered a judgment not conforming to the Mandate of the highest court.

Petitioners could not qualify under this rule then, and they cannot now.

III. No Federal Question Passed Upon by State Court

In spite of the failings of Petitioners' procedure, did the highest state court in fact pass upon any Federal question?

Their language in the Order Denying Petition to Recall Remittitur (R. 35) is: "* * * having considered the * * * petition; * * * the * * * answer * * *; and the * * * reply * * *, It is Ordered that the petition for the recall of the remittitur be and it is hereby denied."

Petitioners' lone citation (Petition pp. 14-15) is not apt here. In that case, *Grannis v. Ordean*, 234 U.S. 385, a due process question under the Fourteenth Amendment was raised in a Petition for Re-Argument, and the state court specifically overruled the contention that rights under the amendment had been infringed and declared that its decision was to be interpreted as holding against the contention.

Even had the Federal question in the case at bar been advanced in the Petition for Rehearing (R. 13-26), which it was not, or as it was advanced eight days after final judgment, it was never passed upon. The orders denying the petitions contain but a cursory recital and show no consideration and disposition of a Federal question. See *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, 216 U.S. 396, 399; *McCorquodale v. Texas*, 211 U.S. 432, 436-7.

CONCLUSION

For all the reasons stated, Respondents submit that this Petition should be denied.

Respectfully submitted,

LANE SUMMERS,
Counsel for Respondents,
Central Building, Seattle 4, Wash.

KAHIN, CARMODY & HORSWILL

BURTON C. WALDO,
Of Counsel,
Central Building, Seattle 4, Wash.